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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000489 09/01/2010

CLERK OF THE COURT
HON. JONATHAN H. SCHWARTZ T. Tankersley
FOR HONORABLE JOSEPH B. HEILMAN Deputy

ROBERT J HALT, et al. MELANIE C MCKEDDIE

v.

SUNBURST FARMS EAST INC, et al. STEPHANIE MONROE WILSON

ROBERT MACKENZIE
JAMES L SULLIVAN
DAXTON R WATSON
STEVEN W CHEIFETZ

RULING MINUTE ENTRY

The Court having heard argument on several motions for summary judgment and these matters having been taken under advisement,

IT IS ORDERED as follows:

1) Granting Sunburst Farms' Motion for Summary Judgment on all Claims and denying the Homeowners' (Plaintiff Halts) Cross Motion for Summary Judgment on Complaint.

2) Denying Plaintiffs' (Halts) Motion for Partial Summary Judgment Declaring 2007 CC&Rs Invalid.

3) Denying Plaintiffs' (Halts) Motion for Partial Summary Judgment Declaring 2007 CC&Rs Invalid as to Section 7 of the Sunburst Farms Community.

4) Granting Sunburst Farms East, Inc.'s Motion for Summary Judgment to Validate 2007 CC&Rs and to Dismiss Defendants' Counterclaim for Breach of Contract.

The Court finds that the 2007 Amendment is valid. ARS § 10-3601(B) states that no person shall be a member of a Corporation without that person's consent. The statute also clarifies that consent may be express or implied. The issue in this case is whether the 2007 Amendment could permit a majority vote of the homeowners in the Association to require a minority of the homeowners to be members of the Association and pay assessments for the Association's costs of maintaining an irrigation system. The Court concludes that in this case there exists both express and implied consent. Section 8 of the Amended Declaration of Covenants, Conditions, and Restrictions, recorded on December 16, 1974 stated that easements for installation and maintenance of utilities providing irrigation water are reserved on the recorded plat. In addition an 8 foot easement on the plat was reserved for use as a bridle path. This document was recorded at the beginning of the parcel ownership in this Sunburst farms community. Association membership was mandatory.

The community covers four Sections. Thereafter, some Sections' CC&Rs were modified to say that membership in the Association was voluntary. From about 1975 until 2007 all Sections but Section 2 were operated under amended CC&Rs that allowed for voluntary membership in the Association. The effect of the amendments in or about 1975 was to permit homeowners who did not want irrigation water on their parcels not to have to pay a fee for the maintenance of this water system. Those homeowners who wanted the water and used it would pay the Association an assessment.

In 2007 the Association decided that it was unfair for the homeowners who were using the irrigation water to subsidize all the expenses of that system. A majority of the owners in each Section approved the 2007 Amendment.

The homeowners who were in the minority on the vote for the 2007 Amendment (hereinafter "minority homeowners") now argue that they did not expressly or implicitly consent to a change in the CC&Rs that would impose on them mandatory membership in the Association. The most recent case in Arizona in this area of law is the opinion of the Arizona Court of Appeals in *Dreamland Villa Community Club Inc. v. Raimey*, 224 Ariz. 42, 226 P.3d 411 (App., 2010) The Court addressed the issue of whether consent to mandatory membership in the Association was established by reference to the nature of the Declarations when the homeowners originally purchased their interests. Deed restrictions have been found to be a contract between the property owners of the subdivision and the individual lot owners. *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513, 123 P.3d 1148, 1150 (App. 2005)

In *Dreamland* use of the recreational facilities in the Dreamland Villa Community Club (DVCC) was allowed only by virtue of membership in the club. The original restrictions did not clearly permit all homeowners use of the club. The original assessment for use of the club was only for those homeowners who became members of the club. The Court focused its analysis on the fact that the declaration did not afford lot owners who paid an annual assessment, membership in the DVCC. A significant difference between the facts of *Dreamland* and the instant case is that in Sunburst Farms the right to use irrigation water was always available to all the lot owners. After the 1975 amendments, lot owners in at least three of the four Sections could decide whether they would pay for the use of irrigation water. But the original declarations put them on notice that the CC&Rs could be amended. In fact the original declarations have been changed from mandatory membership in the Association to voluntary membership. The homeowners should be charged with the knowledge that the CC&Rs could be amended again in the future.

In *Dreamland* the court distinguished the opinion of the Colorado Supreme Court in *Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo.2003). In the Colorado case membership in the Association and payment of assessments were at first voluntary until an amendment made them both mandatory. However, *Evergreen* involved a common area, a park that all homeowners could see when they purchased their lots. All homeowners could use the park. In fact the homeowner who sued the Association in *Evergreen* had admitted that he had used the park. The Colorado court held that an amendment was valid that allowed for a new covenant mandating that every homeowner be a member of the Association and pay mandatory assessments for maintaining the common areas. In *Dreamland* there were no common areas. The original declarations did not mention the DVCC and did not require membership in the DVCC.

The analysis used by the court in *Dreamland* appears to be based on foreseeability and fairness. In the instant case even though most homeowners purchased their homes in the 1980s when the Association was voluntary and only those homeowners who were using the water were paying assessments for that purpose, the fact that irrigation water was available through the Association placed those homeowners on notice that at some time a majority of the homeowners could change the CC&Rs back to the original plan of all homeowners paying assessments for the irrigation water.

This Court concludes that the Association openly maintained the irrigation system at Sunburst Farms. The right to use the water was available to the homeowners. Therefore the system was a "common area". The *Dreamland* case involved a club that did not even exist in the original declarations. The recreational club was created and after that a homeowners association was created. In the instant case the original declarations contained a reference to irrigation and

to the bridle path. The Association was formed after creation of the community and originally required mandatory membership and mandatory assessments.

The reasoning of the Colorado court in *Evergreen* is more applicable to the instant case than *Dreamland* which is significantly different on its facts. The Association in Sunburst Farms effectively asserts that a community should be able to provide funding to support the maintenance of common areas. In *Evergreen* the Colorado court cited the following holdings from courts of other states: "*See e.g.Spinnler Point Colony Ass'n Inc. v. Nash*, 689 A.2d 1026, 1028-1029 (Pa. Commw. Ct. 1977) (holding that where ownership in a residential community allows owners to utilize common areas, 'there is an implied agreement to accept the proportionate costs for maintaining and repairing these facilities.'); *Meadow Run & Mountain Lake Park Ass'n V. Berkel*, 409 Pa. Super. 637, 598 A.2d 1024, 1026 (1991); *Seaview Ass'n of Fire Island, N.Y. Inc. v. Williams*, 69 N.Y.2d 987, 517 N.Y.S.2d 709, 510 N.E.2d 793, 794 (1987) (holding that when lot purchaser has knowledge that homeowners association provides facilities and services to community residents, purchase creates an implied-in-fact contract to pay a proportionate share of those facilities and services)" 73 P.3d at 8.

The fact that the Association in the instant case has operated three Sections for more than 30 years on a voluntary basis does not invalidate the 2007 Amendment. Over the course of 30 years the infrastructure of the irrigation water system will need to be repaired or replaced. As the court in *Evergreen* noted there are strong policy considerations for a community to share the burden of maintaining common areas. The minority homeowners in the instant case argue that since they are not using the water it is not fair to force them to pay a fee for that system. The right to use the water is available to the minority homeowners. This right runs with the land. Although they may not wish to use the water, the system must be maintained for all lot owners, including future owners who may purchase from the minority homeowners. Even if the minority homeowners are not using the water, and have no grass on their property, their trees could be subsisting on the irrigation water from neighbors.

The Court concludes that the rights of the individual lot owner must be balanced against the community's interest in maintaining a common area, the irrigation system. It is reasonable for the community in the instant case to permit a majority vote of its homeowners to pass the 2007 Amendment and impose mandatory assessments on all homeowners. The burden of this servitude is $20 per month. If the homeowner does not use the irrigation water he or she is assessed the $20 each month to defray the Association's costs of maintaining the system. If the homeowner decides to use the water and wants to pay an "irrigator" to turn the irrigation valves on and off, the irrigator charges approximately $65 per month for that service. No one is forcing the minority homeowners to use the irrigation water. But just like the park in *Evergreen* is available to every homeowner, so is the right to use irrigation water in Sunburst Farms. This right runs with the land.

The Court concludes that the 2007 Amendments are valid as to Section 7 and that they take effect at the start of the successive extension period, January 1, 2013. *Scholten v. Blackhawk*, 184 Ariz. 326, 909 P.2d 393 (App. 1995) holds that any amendment passed during an extension period becomes effective at the next extension period. The *Scholten* case involved language identical to this case. The Court interprets the language "then owners" to be the owners at the time of the vote and not the owners at the time the amendment would become effective. The vote can take place well before the next extension period.

The Court also concludes that Sunburst did not have to get notarized signatures from every homeowner who voted for the 2007 Amendments. The CC&Rs do not convey property. They are a servitude that constitutes a contract. Only a servitude that conveys an interest in real property have to be notarized. ARS sec. 33-401. *Rensel v.Pinnacle Homeowners' Associations*, 2009 WL 251139 (Ariz. App.. Div. 1)

The Court concludes that the 2004 Settlement Agreement was a private covenant. ARS § 33-440 (B)(2) uses very broad language to define a private covenant. Any covenant, restriction or condition regarding real property is a private covenant. In the 2004 Agreement the Association agreed to allow homeowners to opt out of membership and not to have to pay assessments (except for the bridle path). The affect of the agreement was to require members to pay a greater share for the use of the irrigation water. Therefore, the 2004 Agreement was a covenant that was in regard to real property because the right to use irrigation water was appurtenant to the real property of all of the owners of the four Sections in Sunburst Farms. The statutory requirement makes sense in this situation because the owners who did not want to opt out of membership should have been consulted before a lawsuit was settled that purportedly would substantially increase their cost for using irrigation water. The 2004 agreement is invalid and unenforceable because the Association did not acquire the consent of the owners of the real property who were affected by the private covenant. ARS § 33-440 (A)(2).